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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JASPER JACKSON, Plaintiff and Appellant, v. MARLENE ELAINE JACKSON, Defendant and Respondent.	B208789 (Los Angeles County Super. Ct. No. BC383483)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Jasper Jackson, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Jasper Jackson appeals from an order striking his complaint as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (the anti-SLAPP statute).[1] We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY[2]

Respondent Marlene Elaine Jackson is appellant Jasper Jackson's former spouse.[3] The action to dissolve their marriage apparently was initiated in 2006.

According to Jasper's charging pleading, around January 2006, Marlene reported to the Inglewood Police Department that she was being abused by Jasper. She subsequently obtained a domestic violence restraining order against him. Jasper denies the abuse occurred. Marlene told a number of people about the restraining order and the alleged abuse that precipitated it. These people included Jasper's daughter, Marlene's coworkers, and a number of Jasper's friends. Marlene contacted the police at least twice to report that Jasper was at her residence in violation of the restraining order.

Other conflicts arose between the parties during the pendency of the dissolution action. In one instance, a third party, acquainted with both Jasper and Marlene, received an anonymous letter informing him that his wife was having an extramarital affair. When the third-party's wife showed the letter to Marlene, Marlene said she believed the handwriting was Jasper's. Jasper subsequently received three anonymous phone calls stating that if he did not apologize to the wife implicated in the letter, he should "watch his back." In another instance, a client of Jasper's business informed Jasper that Marlene had told her Jasper "always takes everyone [*sic*] money and don't [*sic*] do the work."

On January 9, 2008, Jasper filed the present action against Marlene seeking

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] We base our factual summary on the allegations of the complaint and the evidence presented in connection with the anti-SLAPP motion. We offer no opinion as to the accuracy of these allegations.

[3] Because the parties share the same last name, we refer to them by their first names for convenience.

damages for defamation and intentional infliction of emotional distress. Marlene responded with a motion to strike Jasper's complaint pursuant to the anti-SLAPP statute. The trial court granted the motion to strike, finding Jasper's causes of action arose from activities protected by the anti-SLAPP statute and that Jasper had not demonstrated a reasonable probability of prevailing on his claims. This timely appeal follows the order granting the motion to strike.[4]

DISCUSSION

"Section 425.16 provides for the early dismissal of certain unmeritorious claims by means of a special motion to strike." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669.) The statute provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

"Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the

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[4] Marlene did not file a respondent's brief after due notice pursuant to California Rules of Court, rule 8.220. "The rule we follow in such circumstances 'is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found.'" (*Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7.)

claim. (§ 425.16, subd. (b)(1); [citation].)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

With regard to the first step, the trial court concluded Marlene had made a showing that Jasper's causes of action arose from protected activity: statements made by Marlene in connection with litigation between the parties. The trial court then determined Jasper had not demonstrated a probability of prevailing on his claims, because he had not submitted competent evidence to support the allegations in his complaint. Jasper challenges the trial court's findings regarding both steps.[5] "The trial court's determination of each step is subject to de novo review on appeal." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1159.)

I

"A defendant meets the burden of showing that a plaintiff's action arises from a protected activity by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e)." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569.) These categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right

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[5] The trial court granted the anti-SLAPP motion as to both causes of action identified in the complaint: defamation and intentional infliction of emotional distress. Jasper's brief addresses only the defamation cause of action. Consequently, any objection to the striking of the intentional infliction of emotional distress cause of action is waived. (See *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 ["'An appellate brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived."'"].) We consider only whether the trial court erred in granting Marlene's anti-SLAPP motion as to the defamation cause of action.

of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

We begin our inquiry by identifying the allegations in Jasper's complaint that form the basis of the defamation claim. Although the complaint is imprecise as to which of Marlene's statements are allegedly defamatory, Jasper appears to base his claim on the following: (1) Marlene told the court Jasper assaulted her in order to obtain a restraining order; (2) Marlene informed friends that Jasper "had inflicted bodily injuries and she had to get a restraining order issued"; (3) Marlene informed Jasper's daughter that Jasper "beat [Marlene] and that [Marlene] obtained a restraining order against [Jasper]"; (4) Marlene informed her coworkers that "she has a restraining order against [Jasper] for beating her"; (5) after a third party received an anonymous letter alleging that person's wife was having an extramarital affair, Marlene said the letter appeared to be in Jasper's handwriting; and (6) Marlene told Jasper's client that Jasper "always takes everyone [*sic*] money and don't [*sic*] do the work."

Jasper argues that the anti-SLAPP statute does not apply because Marlene's conduct was not connected with an issue of public interest. Although acts in connection with issues of public interest are protected (see § 425.16, subd. (e)), that is not the category on which the trial court relied when finding Marlene's activities were protected. Rather, the trial court found most of the statements were made in connection with a court order issued in an ongoing family law matter between the parties, and were therefore made in connection with an issue under consideration by a judicial body (see *ibid.*).[6] This is an independent basis for a finding that the action arises from protected activity, and

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[6] Jasper's appellate brief alleges additional acts by Marlene, which he claims fall outside the scope of protected activity for the purposes of the anti-SLAPP statute. These acts include: "False fining [*sic*] a Temporary Restraining order, cashing Appellant[']s personal checks, Calling the Police and telling them I'm going to commit suicide and have someone calling my job to harm me." These allegations were not set forth in the complaint as acts underlying the defamation cause of action, and therefore are not properly considered as conduct from which the claim arises. (See *Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 519.)

does not require a showing of public interest. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109.)

The first allegedly defamatory statements—those made by Marlene in support of her application for a domestic violence restraining order—fall squarely within the protected category of statements made in connection with an issue under consideration by a judicial body. (See *Siam v. Kizilbash*, *supra*, 130 Cal.App.4th at p. 1569 [statements to authorities to report child abuse protected under section 425.16, subdivision (e)].)

The next three categories of statements—those made to friends, family, and coworkers about the existence of and reasons for the restraining order—were made in connection with the same judicial proceeding. Statements to third parties in anticipation of and preparation for litigation routinely have been protected under section 425.16, subdivision (e). (See *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1270 [citing several cases in which communication with third parties was found to be "'in connection with'" pending or anticipated litigation].) Further, subdivision (e) of section 425.16 has been interpreted as protecting factual reports of past or ongoing judicial proceedings. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 863, a university sued a newspaper for publishing allegedly defamatory articles describing a legal dispute between the university and a county that involved a request for injunctive relief by the county and a federal civil rights suit filed by the university. The court found that the articles fell within the protection of section 425.16, subdivision (e), because they were dependent on and related to the official proceedings they described. (*Ibid*.) By comparison, in the present case, not only are Marlene's statements to third parties reports of a judicial proceeding, they were made to people who may have been affected by the judicially issued restraining order. A restraining order against a person's spouse or former spouse likely will affect not only those two parties, but also third parties who formerly interacted with the parties as a couple. Coworkers of the protected party, friends, and family members are the type of third party likely to fall into this category, and these are the people Jasper alleges were informed by Marlene about the restraining order. Thus, the statements fall within the protection of section 425.16, subdivision (e).

The final two statements underlying the defamation cause of action—those pertaining to the anonymous letter and Jasper's business practices—do not fall into any category of protected activity.

Thus, Jasper's claim for defamation is what is known as a mixed cause of action, meaning the underlying allegations involve both protected and unprotected conduct. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra,* 133 Cal.App.4th at p. 672.) "A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287.) "Where both constitutionally protected and unprotected conduct is implicated by a cause of action, a plaintiff may not 'immunize' a cause of action . . . from a special motion under section 425.16 by the artifice of including extraneous allegations concerning nonprotected activity. . . . Conversely, if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.)

Here, the protected conduct is not incidental to the unprotected conduct. The majority of the complaint's allegations regarding Marlene's purportedly defamatory communications have to do with the statements she made in connection with the restraining order. Similarly, the harms allegedly suffered by Jasper are largely related to the restraining order. For example, Jasper alleges he was detained by port patrol officers, denied the opportunity to coach children's sports, and impeached during his criminal prosecution because of the existence of the restraining order.

Jasper contends the trial court should have permitted him to amend his complaint. He does not address, or even acknowledge, the rule that "[w]hen a cause of action is dismissed pursuant to section 425.16, the plaintiff has no right to amend the claim." (*Salma v. Capon, supra,* 161 Cal.App.4th at p. 1293.) Furthermore, he offers no legal

argument or citation to authority in support of his contention, so we consider it waived. (See *Niko v. Foreman, supra,* 144 Cal.App.4th at p. 368.)

We conclude Marlene has carried her burden to show Jasper's cause of action for defamation arises from protected activity. We turn to the second step of the anti-SLAPP analysis: the probability that the plaintiff will prevail on the merits.

II

"[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), . . . 'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89.)

The form of defamation alleged by Jasper is slander, because the statements underlying the cause of action were communicated orally. (Civ. Code, §§ 44 & 46.) "To establish a prima facie case for slander, a plaintiff must demonstrate an oral publication to third persons of specified false matter that has a natural tendency to injure or that causes special damage. [Citation.] Certain statements are deemed to constitute slander per se, including statements (1) charging the commission of crime, or (2) tending directly to injure a plaintiff in respect to the plaintiff's business by imputing something with reference to the plaintiff's business that has a natural tendency to lessen its profits. [Citations.] Slander per se is actionable without proof of special damage." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106-107.) The communication must be unprivileged in order to be actionable. (Civ. Code, § 46.)

The complaint is legally insufficient with respect to the statements made by Marlene in order to get a restraining order, because those statements are protected by the absolute privilege of Civil Code section 47, subdivision (b),[7] also known as the litigation privilege. (See, e.g., *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.)

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[7] This section provides, in relevant part, "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any

As to the other statements, we need not address the legal sufficiency of the complaint, because Jasper has not adduced competent, admissible evidence to establish a probability of prevailing on his claim. "It is well settled that in opposing a SLAPP motion the plaintiff's showing of a probability of prevailing on its claim must be based on admissible evidence." (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147.) "[T]he proper view of 'admissible evidence' for purposes of the SLAPP statute is evidence which, by its nature, is capable of being admitted at trial, i.e., evidence which is competent, relevant and not barred by a substantive rule. Courts have thus excluded evidence which would be barred at trial by the hearsay rule, or because it is speculative, not based on personal knowledge or consists of impermissible opinion testimony. This type of evidence cannot be used by the plaintiff to establish a probability of success on the merits because it could never be introduced at trial." (*Ibid*., fns. omitted; see also *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1266-1269.)

The only evidence submitted by Jasper in support of his opposition to the anti-SLAPP motion was his own declaration. The trial court concluded the declaration did not support Jasper's allegations because it lacked foundation or personal knowledge and was argumentative. We agree. For example, the only evidence that Marlene made the statement to Jasper's client is Jasper's declaration, "[The client] said to [Jasper], 'Your wife is bad mouthing you'. [The client] further stated the defendant said [Jasper] always takes everyone [*sic*] money and don't [*sic*] do the work." This statement is inadmissible hearsay, pursuant to Evidence Code section 1200. Similarly, the only evidence that Marlene told her coworkers about the restraining order is Jasper's declaration, "The defendant informed her entire staff at Bath and Body Works (LA store) and staff at a different location (Fox Hills and La Tiera [*sic*] stores) that she has a restraining order

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other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure . . . ." (Civ. Code, § 47.)

against [Jasper] for beating her." This statement is inadmissible because of a lack of foundation as to Jasper's personal knowledge of the fact. (See Evid. Code, § 702.)

Jasper offered no evidence as to the other allegedly defamatory statements. His declaration does not mention Marlene's alleged statement about the handwriting on the anonymous letter or her alleged statements to Jasper's daughter and friends regarding the restraining order. These allegations appear only in Jasper's unverified complaint and his opposition to the anti-SLAPP motion, neither of which may be considered as evidence to establish a probability of prevailing on his claim. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 [""""[A] party cannot simply rely on the allegations in its own pleadings, even if verified, to make the evidentiary showing required in the summary judgment context or similar motions . . . . The same rule applies to motions under [the anti-SLAPP statute]. . . . Similarly, an averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim."""].)

Jasper objects to the lack of opportunity for discovery, though he acknowledges that discovery is stayed by an anti-SLAPP motion. (See § 425.16, subd. (g).) The anti-SLAPP statute provides for limited discovery, "on noticed motion and for good cause shown" (*ibid*.), but it does not appear that Jasper made any such motion. His brief refers to his "well-considered request for such discovery," but he provides no citation to where such a request appears in the record, and our independent review has revealed no such motion. "Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

In short, Jasper failed to establish a probability of prevailing on his claim. The trial court did not err in granting Marlene's anti-SLAPP motion to strike Jasper's complaint.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.